No. 91-1945

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

TRIANGLE INDUSTRIES, INC
A/K/A ANC HOLDINGS, INC.,
TRIANGLE PWC, INC.,
PETITIONERS,
v.
LIBERTY MUTUAL INSURANCE CO.,
NEW JERSEY PROPERTY/LIABILITY INSURANCE
GUARANTY ASSOCIATION, ON BEHALF OF
IDEAL MUTUAL INSURANCE COMPANY,
IN LIQUIDATION,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

I. Whether the United States Court of Appeals for the Fourth Circuit, with full knowledge of the holding of the United States Court of Appeals for the First Circuit in *CPC International Co.* v. *Northbrook Excess and Surplus Insurance Co.*, and of the grant of certification by the New Jersey Supreme Court in *Morton International Inc.* v. *General Accident Insurance Co. of America*, properly exercised its discretion in denying Petitioner's Motion to Recall and Stay its Mandate in the case below?

II. Whether the United States Court of Appeals for the Fourth Circuit properly applied the standards articulated by this Court in *Salve Regina College* v. *Russell*, ___ U.S. ___, 111 S.Ct. 1217, 1222 (1991) and *Commissioner of Internal Revenue* v. *Bosch's Estate*, 387 U.S. 456 (1967), in predicting how, as a matter of state law, the New Jersey Supreme Court would construe the "pollution exclusion" in the Comprehensive General Liability ("CGL") insurance policies issued to Triangle Industries?

Table of Contents.

Questions Presented i

Table of Contents iii

Table of Authorities iv

Statement of the Case 2

Summary of Argument 4

Argument 6

I. This court should refuse to grant the petition for certiorari and disturb the finality of the mandate of the United States Court of Appeals for The Fourth Circuit because there is no "inter-circuit" conflict on an issue of Federal Law, and because petitioners have failed to show that the Fourth Circuit has improperly considered or predicted how the New Jersey Supreme Court would rule on a question of State Law. 6

A. Petitioners have failed to show that there is an "inter-circuit" conflict between decisions of United States Courts of Appeal or other special and important reasons for this Court to grant certiorari. 6

B. This Court should not disturb the Fourth Circuit's mandate because there is no guarantee that the New Jersey Supreme Court in *Morton* will rule on the effect of the pollution exclusion clause in CGL policies and even if it were certain that that Court would rule on the clause's effect, it is probable that it would, in conformity with the Fourth Circuit's prediction, determine that the clause applies to the discharge of pollutants as opposed to the damage that results from a discharge. 9

II. "Persuasive data" establishes that the Fourth Circuit correctly predicted the New Jersey Supreme Court would hold that the pollution exclusion excludes coverage for intentional, long-term waste disposal. 12

A. New Jersey rules of contract interpretation. 14

B. The Fourth Circuit had ample authority for disregarding "incorrect" State Court decisions regarding the pollution exclusion. 15

C. The New Jersey Supreme Court would, at a minimum, conclude that "sudden and accidental" applies to the release of pollution and not to any resulting property damage. 17

D. The Fourth Circuit properly determined that the New Jersey Supreme Court would hold that the releases of Triangle's sludge at the Buckeye Landfill were not sudden and accidental. 19

Conclusion 27

Table of Authorities Cited.

CASES.

Alphin v. Henson, 552 F.2d 1033, 1035 (4th Cir. 1977), *cert. denied*, 434 U.S. 823 (1977) 9

American Iron and Steel Institute v. EPA, 560 F.2d 589, 594 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978) 9, 10

American Motorists Ins. Co. v. General Host. Corp., 667 F. Supp. 1423, 1428 (D. Kan. 1987), *aff'd*, 946 F.2d 1482 (10th Cir. 1991) 23

American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549, 1553 (E.D. Mich. 1984) 22n

Barmet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201 (Ind. App. 1981) 22n

Borden Inc. v. Affiliated FM Ins. Co., 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd without op.*, 865 F.2d 1267 (6th Cir. 1989), *cert. den.*, 493 U.S. 817 (1989) 15, 16

Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals Co., Inc., 17 Ohio App.3d 127, 477 N.E.2d 1227 (1984) 15

Brynildsen v. Ambassador Ins. Co., 113 N.J. Super. 514, 274 A.2d 327 (1971) 14

C.L. Hauthaway & Sons Corp. v. American Motorists Ins. Co., 712 F. Supp. 265 (D. Mass. 1989) 23

Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465 (1967) 13

Cooper Development Co. v. Employers Ins. of Wausau, 765 F. Supp. 1429 (N.D. Cal. 1991) 19n

Covenant Ins. Co. v. Friday Engineering, Inc., 742 F. Supp. 708, 1990 U.S. Dist. LEXIS 10,821 (D. Mass. 1990) 19n

CPC International Co. v. Northbrook Excess and Surplus Insurance Co., Nos. 91-1580 and 91-1734, 1992 U.S. App. LEXIS 5342 (1st Cir. March 24, 1992) 3, 8, 19n

Dudley v. Victor Lynn Lines, Inc., 32 N.J. 479, 491, 161 A.2d 479, 485-86 (1960) 20n

Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 702 F. Supp. 1317 (E.D. Mich. 1988) 18n, 19n, 23

Fischer & Porter Co. v. Liberty Mutual Ins. Co., 656 F. Supp. 132 (E.D. Pa. 1986) 19n, 21n

FL Aerospace v. Aetna Cas. & Surety Co., 897 F.2d 214 (6th Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S.Ct. 284 (1990) 16

Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F. 2d 30 (1st Cir. 1984) 22n

Greater Boston Television Corporation v. F.C.C., 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) 10

Harden v. Morris Basin Dry Docks Co., 23 N.J. Super. 48, 52, 92 A.2d 148, 150 (1952) 20n

Hines v. Royal Indem. Co., 253 F.2d 111, 114 (6th Cir. 1958) 10

Hudson Ins. Co. v. Double D Mgmt. Co., No. 89-1631-CIV-T-17B (M.D. Fla. June 28, 1991) 19n

International Minerals & Chemical Corp. v. Liberty Mutual Ins. Co., 168 Ill. App. 3d 361, 522 N.E.2d 758, (Ill. Ct. App. 1st Dist. 1988), *appeal denied*, 122 Ill. 2d 576, 530 N.E.2d 246 (Ill. 1988) 18n, 23, 25, 26n

Johnson v. Bechtel Associates Professional Corp., 801 F.2d 412, 416 (D.C. Cir. 1986) 10

Jonesville Products, Inc. v. Transamerica Ins. Group, 156 Mich. App. 508, 402 N.W.2d 46 (1986), *app. den.*, 428 Mich. 897 (1987) 16

Lansco, Inc. v. Department of Environmental Protection, 138 N.J. Super. 275, 350 A.2d 520, 88 A.L.R. 3d 172 (Ch. Div. 1975), *aff'd*, 145 N.J. Super 433, 368 A.2d 363 (App. Div. 1976), *certif. den.*, 73 N.J. 57, 372 A.2d 322 (1977) 20

Liberty Mutual Ins. Co. v. Triangle Ind. et al., No. 91-1685, Slip op. at 3 (4th Cir. March 2, 1992) 12

Liondale Bleach, Dye & Paint Works v. Riker, 85 N.J.L. 426, 429, 89 A. 929, 931 (1914) 20n

Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 582 A.2d 1257 (1990) 14

Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc., 407 Mass. 675, 679, 555 N.E.2d 568 (1990) 17, 23, 24, 25

Matter of Community Medical Center, 623 F.2d 864 (3rd Cir. 1988) 14

Morton International, Inc. v. General Accident Insurance Co. of America, Docket No. 34,341 (N.J. Sup. Ct., *certif. granted*, March 2, 1992) 3, 11

Morton International, Inc. v. General Accident Insurance Co. of America, No. A-895-89T3 (App. Div. October 2, 1991) 11, 12

Morton Thiokol, Inc. v. General Accident Ins. Co. of America, No. C-3956-85 (NJ. Super. Ct., Law Div., Bergen Co., August 27, 1987) 24n

New Wrinkle, Inc. v. John L. Armitage & Co., 238 F.2d 753 (3rd Cir. 1956) 15

New Castle County v. Hartford Accident and Indem. Co., 933 F.2d 1162, 1169 (3d Cir. 1991) 18

Northern Ins. Co. v. Aardvarks Assoc., Inc., 942 F.2d 189 (3rd Cir. 1991) 25

Powers v. Bethlehem Steel Corporation, 483 F.2d 963, 964 (1st Cir. 1973), *cert. denied*, 414 U.S. 856 (1973) 10

Prather v. American Motorists Ins. Co., 2 N.J. 496, 67 A.2d 135, 138 (1949) 15, 25

Ptak v. General Electric Co., 13 N.J. Super. 294, 298, 80 A.2d 337, 339, *aff'd*, 16 N.J. Super. 573, 85 A.2d 214 (1951) 20n

Roberts v. Beitler, 34 N.J. Super. 470, 475-76, 112 A.2d 797, 800 (1955) 20n

Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 58 S.Ct. 860, 861 (1938) 6

Salve Regina College v. Russell, ___ U.S. ___, 111 S.Ct. 1217 (1991) 7

State of New York v. Amro Realty Corp., 697 F. Supp. 99 (N.D.N.Y 1988), *aff'd in part, rev'd in part*, 936 F.2d 1240 (2d Cir. 1991) 16

Technicon Elecs. Corp. v. American Home Assurance Co., 74 N.Y. 2d 66, 544 N.Y.S. 2d 531, 542 N.E.2d 1042 (1989) 16, 17

Transamerica Ins. Co. v. Sunnes, 77 Or. App. 136, 141, 711 P.2d 212 (1985), *rev. den.*, 301 Or. 76, 717 P.2d 631 (1986) 17

U.S. Fidelity & Guaranty Co. v. Star Fire Coals Inc., 856 F.2d 31 (6th Cir. 1988) 22n, 24

U.S. Fidelity & Guaranty Co. v. Murray Ohio Mfg. Co., 693 F.Supp. 617 (M.D. Tenn 1988) 24

U.S. Radium Corp. v. Globe Indemnity Co., 13 N.J. Misc. 316, 178 A. 271 (1935), *aff'd*, 116 N.J.L. 90, 182 A. 626 (1936) 20n

Upjohn v. New Hampshire Ins. Co., 438 Mich. 197, 207, 476 N.W.2d 392, 397 (Mich. Sup. Ct. 1991) 24

Walker Rogge, Inc. v. Chelsea Title & Guar. Co., 116 N.J. 517, 529, 562 A.2d 208, 214 (1989) 14

Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (N.C. 1986) 21n

Webster's Third New Intermediate Dictionary (1966) 20n

Webster's Third New International Dictionary (1976) 23

STATUTES AND RULES.

Sup. Ct. Rule 10.1 6

Sup. Ct. Rule 10.1(a) 6

Sup. Ct. Rule 29.1 2

MISCELLANEOUS.

19 Couch on Insurance 2nd § 79.385 19n

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LIBERTY MUTUAL INSURANCE CO.,
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PETITION FOR WRIT OF CERTIORARI TO
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JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents, Liberty Mutual Insurance Co. and New Jersey Property/Liability Insurance Guaranty Association, on behalf

of Ideal Mutual Insurance Company, in liquidation respectfully request that this Court deny the Petition for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned proceeding on March 2, 1992.

Statement of the Case.

This is a declaratory judgment action to determine whether petitioners, Triangle Industries, Inc. and Triangle PWC, Inc. (collectively "Triangle"), are entitled to insurance coverage under certain policies issued to them by Liberty Mutual Insurance Company ("Liberty Mutual")[1] and Ideal Mutual Insurance Company[2] ("Ideal") (collectively the "Insurers" or "Respondents"). The "pollution exclusion" found in many of the policies issued to Triangle provides that the policies do not apply to property damage:

> Arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Petition for Writ of Certiorari, A 7-8.

[1] In accord with Sup. Ct. Rule 29.1, Liberty Mutual states that it only has wholly-owned subsidiaries.

[2] Represented in this action by the New Jersey Property Liability Guaranty Association (NJPLIGA).

The complaint was originally filed by Liberty Mutual in the United States District Court for the District of West Virginia. Triangle then brought third-party actions against Zurich Insurance Company, Ideal and Wausau Insurance Company.[3] After adequate time for discovery, the parties filed cross-motions for summary judgment. The District Court granted the Insurers' motions, finding that the various pollution exclusions in Liberty Mutual's, Zurich's and Ideal's policies excluded coverage to Triangle. On March 2, 1992, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's Judgment, holding that the "accidental" portion of the pollution exclusion clause in the policies applies to the discharge of pollutants as opposed to the resulting damage, and that the pollution exclusion therefore bars coverage for environmental damage alleged to arise from the regular, long-term disposal of industrial waste in a landfill. On April 24, 1992, the Fourth Circuit, with full knowledge of both the New Jersey Supreme Court's grant of Certification in *Morton International, Inc.* v. *General Accident Insurance Co. of America*, Docket No. 34,341 (N.J. Sup. Ct., *certif. granted*, March 2, 1992), and the decision of the First Circuit Court of Appeals in *CPC International Co.* v. *Northbrook Excess and Surplus Insurance Co.*, Nos. 91-1580 and 91-1734, 1992 U.S. App. LEXIS 5342 (1st Cir. March 24, 1992), denied Petitioners' Motion to Recall and Stay the Fourth Circuit's Mandate filed on March 23, 1992.

The facts of this case are essentially as set forth in Petitioner's Statement Of The Case.

[3] Wausau has settled out of this case and the issues raised by this Petition do not apply to Zurich.

Summary of Argument.

I. THIS COURT SHOULD REFUSE TO GRANT CERTIORARI AS THERE IS NO "INTER-CIRCUIT" CONFLICT ON AN ISSUE OF FEDERAL LAW OR OTHER SPECIAL OR IMPORTANT REASON FOR GRANTING CERTIORARI.

Contrary to Triangle's contention, conflict among circuits is not a reason for granting certiorari with respect to questions controlled by *state* law. The issues involved on this case involve only state law concerning the interpretation of insurance contracts. If there is any conflict between the Fourth Circuit's decision in this case and the First Circuit's decision in *CPC International Co., supra.*, it is on an issue of *state* as opposed to *federal* law. Petitioners do not contend that the Fourth Circuit applied the *Salve Regina* test improperly in reaching its decision as to how the New Jersey Supreme Court would rule on the effect of the pollution exclusion; they are simply unsatisfied with the Fourth Circuit's *result*. Without other special or important reasons, which Petitioners have failed to show exist, this Court has no reason to grant certiorari.

II. THE NEW JERSEY SUPREME COURT'S GRANT OF CERTIFICATION IN THE MORTON CASE DOES NOT PRESENT A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI.

The *Morton* case may or may not decide some of the same issues that the Fourth Circuit decided in this case. It would be unwarranted, however, for this Court to grant certiorari and disturb the Fourth Circuit's Mandate on the mere possibility that the New Jersey Supreme Court may now rule differently on insurance coverage issues than has the Fourth Circuit.

Even were it certain that the New Jersey Supreme Court would definitively rule on the pollution exclusion clause in *Morton*, it is highly probable that that Court would rule as the Fourth Circuit has predicted and find that the "exception" to the pollution exclusion clause applies to the discharge of pollution and not the resulting damage. The Fourth Circuit considered and rejected the same argument advanced by Petitioner with respect to the *Morton* case and exercised its discretion in denying Petitioner's Motion to Recall and Stay the Mandate. Petitioners make no claim that the Fourth Circuit abused its discretion in so doing. There is no reason for this Court to upset the finality of the Fourth Circuit's decision.

III. This Court Must Deny Certiorari Because The Fourth Circuit Properly Predicted How the New Jersey Supreme Court Would Rule On An Issue of State Law.

The Fourth Circuit relied on established New Jersey rules of contract interpretation and other "persuasive data" in predicting that the New Jersey Supreme Court would hold that the pollution exclusion excludes coverage for intentional, long-term waste disposal. The Fourth Cireuit properly determined that the New Jersey Supreme Court would ignore decisions of lower New Jersey courts to the contrary.

Petitioners challenge the *result* reached by the Fourth Circuit not the *process* by which this result was reached. Petitioners do not contend that the Fourth Circuit failed to follow the mandate of *Salve Regina*. Rather, Petitioners seek to have this Court review the decision of the Fourth Circuit on a matter of *state law*. Absent a claim that the result was reached in a *manner* prohibited by federal law, as articulated by *Salve Regina*, this Court must deny the Petition.

Argument.

I. This Court Should Refuse to Grant the Petition for Certiorari and Disturb the Finality of the Mandate of the United States Court of Appeals for the Fourth Circuit Because There Is No "Inter-Circuit" Conflict on an Issue of Federal Law, and Because Petitioners Have Failed to Show That the Fourth Circuit Has Improperly Considered or Predicted How the New Jersey Supreme Court Would Rule on a Question of State Law.

A. *Petitioners Have Failed to Show That There Is an "Inter-Circuit" Conflict Between Decisions of United States Courts of Appeal or Other Special and Important Reasons for This Court to Grant Certiorari.*

A review on writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. Rule 10.1. A petition for a writ of certiorari is only to be granted where there are special and important reasons. *Id.* One such reason may be where a United States court of appeals has rendered a decision in conflict with a decision of another United States court of appeals on the same matter of federal law. Sup. Ct. Rule 10.1(a).

The very authority relied upon by Triangle in seeking certiorari supports denial of its Petition. The case of *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 58 S.Ct. 860, 861 (1938), cited by Triangle provides:

> As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely a permissible difference of opinion in the state courts.

The *Ruhlin* Court continued that a reason for granting certiorari exists where the Circuit Court "has decided an important question of local law in a way probably in conflict with applicable local decisions." *Id.*

This sentence suggests that certiorari is appropriate only where a Circuit Court has used an improper *method* in reaching a decision. As contemplated by *Ruhlin*, this can occur if the Circuit Court fails to follow controlling state law. In this case, neither the Fourth Circuit (or the First Circuit in the *CPC International* case) had controlling state law to follow. Indeed, the Court was attempting to predict what such law would be. This Court can only take cognizance of the Fourth Circuit's decision then if it followed an impermissible procedure in making this prediction. The method a federal court must follow in predicting how a state Supreme Court will rule on a question has most recently been set out by this Court in *Salve Regina College* v. *Russell*, ___ U.S. ___, 111 S.Ct. 1217 (1991). Under *Salve Regina*, the Fourth Circuit is permitted to disregard the decisions of New Jersey intermediate courts if it predicts that the New Jersey Supreme Court would also do so. Triangle does not contend that the Fourth Circuit failed to follow *Salve Regina*, or that its process or method was otherwise flawed. Triangle disputes only the *result*.

There is simply no "inter-circuit" conflict between the decision of the First Circuit in *CPC International* and the Fourth Circuit's decision in this case on an issue of *federal* law. Instead, both the First Circuit and the Fourth Circuit applied the standards articulated by this Court in *Salve Regina* and *Bosch's Estate*, in predicting how the New Jersey Supreme Court would rule on different issues of *state* law.

There may not even be a conflict of state law. The First Circuit in *CPC International* held that were the New Jersey Supreme Court to consider the question it would find the term "sudden" in the pollution exclusion clause means unexpected

and unintended and does not have a temporal component. *CPC International*, 1992 U.S. App. Lexis 5342 at p. 16. On the other hand, the Fourth Circuit, in its decision, did not determine whether the term "sudden" has a temporal component, but held that the word "accidental" in the pollution exclusion clause in CGL policies applies to the *discharge* of pollution as opposed to the *damage* that results from a discharge and bars coverage for unintended environmental damage alleged to arise from the regular disposal in a landfill of industrial waste. There is no "inter-circuit" conflict as to how the New Jersey Supreme Court would interpret the term "sudden." The Fourth Circuit's decision did not address this word.

Even if, as Petitioners contend, the Fourth Circuit and First Circuit did rule differently on the exact same issue of state law this would not create an "inter-circuit" conflict on a question of *federal* law. Rather it would merely indicate different federal courts, using the same test, reaching different predictions of how a state court would decide a *state* law question. This type of "inter-circuit" conflict is not one over which this Court has jurisdiction. Triangle is simply dissatisfied with the result that the Fourth Circuit reached in making its prediction on a state law question. That dissatisfaction does not translate into a reason why this Court should grant certiorari.

Petitioners have offered no other special or important reasons why this Court should grant the Petition. Accordingly, this Court should deny the Petition.

B. *This Court Should Not Disturb the Fourth Circuit's Mandate Because There Is No Guarantee That the New Jersey Supreme Court in Morton Will Rule on the Effect of the Pollution Exclusion Clause in CGL Policies and Even of it Were Certain That That Court Would Rule on the Clause's Effect, it Is Probable That it Would, in Conformity With the Fourth Circuit's Prediction, Determine That the Clause Applies to a Discharge of Pollutants as Opposed to the Damage That Results From a Discharge.*

Triangle argues that since the New Jersey Supreme Court has granted certification in the *Morton* case, this Court should grant certiorari and take the extraordinary step of staying the Mandate of the Fourth Circuit. Triangle contends that "it would be anomalous and unfair" were Liberty Mutual to prevail in this case based upon the "fortuitous circumstance" that the Fourth Circuit rendered its opinion in this case before a decision in the *Morton* case. *Petition for Writ of Certiorari* at 12. As discussed below, however, there is no unfairness to Triangle because the Fourth Circuit fairly decided this case and there was nothing wrong with the procedures applied in doing so.

In essence, Petitioners are looking only for *another chance* to get the outcome they were unsuccessfully able to obtain from the Fourth Circuit. Petitioners seek this Court to stay this case rather than to review it on the merits. The Fourth Circuit considered the very arguments advanced by Petitioners and exercised its discretion in denying Petitioners' Motion to Recall and Stay the Mandate. In so doing, the Fourth Circuit relied on the well-recognized rule that recall of a Mandate by a court of appeals is an extraordinary remedy, one to be used only sparingly in special circumstances, where "good cause" has been shown or to prevent injustice. *American Iron and Steel Institute* v. *EPA*, 560 F.2d 589, 594 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *Alphin* v. *Henson*, 552 F.2d

1033, 1035 (4th Cir. 1977), *cert. denied*, 434 U.S. 823 (1977); *Greater Boston Television Corporation* v. *F.C.C.*, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). The authority to recall a Mandate falls within the discretion of a court of appeals and such discretion is ordinarily employed to recall a Mandate only in highly unusual circumstances. *American Iron*, 560 F.2d at 594. There must be a special reason for recall to override the strong policy of repose, that there be an end to litigation. *Johnson* v. *Bechtel Associates Professional Corp.*, 801 F.2d 412, 416 (D.C. Cir. 1986). As the Sixth Circuit has indicated, to justify recall:

> there must be exceptional circumstances shown, which in the opinion of the Court are sufficient to override the strong public policy that there should be an end to a case in litigation, that when the judgment therein becomes final the rights or liabilities of the parties therein are fully determined, and that the parties thereafter are entitled to rely upon such adjudication as a final settlement of their controversy . . . Otherwise a successful litigant would never have repose in the use of what he has obtained through such litigation.

Hines v. *Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir. 1958). The importance of bringing an orderly end to litigation demands that recall not be liberally allowed. *Powers* v. *Bethlehem Steel Corporation*, 483 F.2d 963, 964 (1st Cir. 1973), *cert. denied*, 414 U.S. 856 (1973). Petitioners do not suggest that the Fourth Circuit abused its discretion in refusing to stay the Mandate; there is accordingly no basis for this Court to upset the Fourth Circuit's decision and stay its Mandate now.

The issues in this case (which go beyond those raised in the *Morton* case) have been fully and fairly litigated. The Fourth Circuit reached its decision upon full consideration of the facts and law and by application of the proper rules of decision. Nothing casts the propriety of this decision in doubt. Petitioner confuses "disappointment" with "injustice"; while it may be disappointed with the result in this case, there is no "injustice" to holding it to the judgment. Future decisions always have the possibility of changing the rules of existing decisions. This, however, is not a sufficient reason to grant certiorari to review or stay the existing decision.

In *Morton International, Inc.* v. *General Accident Insurance Co. of America*, No. A-895-89T3 (App. Div. October 2, 1991), the New Jersey Appellate Division held that damages resulting from mercury contamination of an insured's property and a nearby creek were not the result of an "accident" or "occurrence" as defined in the policyholder's CGL insurance policies and that coverage under the policies was thus barred. The court did not rule directly on the effect of the "pollution exclusion" clause and in particular whether the clause applies to the *discharge* of pollutants or to the *damage* that results from a discharge. Nor did the court determine whether the term "sudden" in the clause has a temporal component. While Liberty Mutual and other insurers have asked the New Jersey Supreme Court to review the "pollution exclusion", there is no guarantee that that Court will rule on the clause's effect.

Thus, while it is possible that the New Jersey Supreme Court, as a result of its decision to hear the *Morton* case, will provide definitive guidance as to the meaning of the pollution exclusion clause, it is equally possible that that court will rely on the New Jersey Appellate Division's denial of coverage on the basis of lack of an accident or occurrence and not interpret the pollution exclusion clause. Triangle's contention that "[i]n *Morton*, the New Jersey Supreme Court will be deciding [the

effect of the "pollution exclusion" clause] in the near future" is thus not entirely accurate. *Petition for Writ of Certiorari* at 13. It would be unwarranted for this Court to disturb the strong interest in finality of litigation and disturb the Fourth Circuit's Mandate on the mere possibility that New Jersey may rule differently on insurance coverage issues than has the Fourth Circuit.

Moreover, even if it is certain that the New Jersey Supreme Court will definitively rule on the pollution exclusion clause in *Morton*, it is highly probable that that Court will rule as the Fourth Circuit has predicted that it would and find that the "exception" to the pollution exclusion clause applies to the discharge of pollution and not the resulting damage. Accordingly, the New Jersey Supreme Court's grant of Certification in *Morton* does not present sufficient justification for this Court to grant certiorari.

II. "Persuasive Data" Establishes That the Fourth Circuit Correctly Predicted the New Jersey Supreme Court Would Hold That the Pollution Exclusion Excludes Coverage for Intentional, Long-Term Waste Disposal.

Triangle urged the Fourth Circuit to follow the path set by New Jersey intermediate appellate courts and hold that the "sudden and accidental" exception to the pollution exclusion applies only if Triangle actually expected or intended to cause property damage through its waste disposal. The Fourth Circuit declined to so rule, indicating that the "pollution exclusion" bars coverage for environmental damage alleged to arise from the planned and regular landfill disposal of waste over the course of years. *Liberty Mutual Ins. Co.* v. *Triangle Ind. et al.*, No. 91-1685, Slip op. at 3 (4th Cir. March 2, 1992).

Petitioner challenges the *result* reached by the Fourth Circuit; it does not challenge the *process* by which this result was reached. Petitioner does not contend that the Fourth Circuit failed to follow the mandate of *Salve Regina*. Rather, Petitioner seeks to have this Court review the decision of the Fourth Circuit on a matter of *state law*. Absent a claim that the result was reached in a *manner* prohibited by federal law, as articulated by *Salve Regina*, this Court must deny the Petition.

While the Fourth Circuit was obligated to give deference to the intermediate Appellate Courts of New Jersey, these decisions were not binding on it. The Fourth Circuit was charged with the duty of determining how the New Jersey Supreme Court would resolve this issue:

> Moreover, even in diversity cases this Court has further held that while the decrees of "lower state courts" should be "attributed some weight . . . the decision [is] not controlling . . ." where the highest court of the state has not spoken on the point. And in *West* v. *AT&T Co.*, this Court further held that "an intermediate appellate state court . . . is datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise*.

Commissioner of Internal Revenue v. *Estate of Bosch*, 387 U.S. 456, 465 (1967) (citations omitted, emphasis in original).

In reaching its decision, the Fourth Circuit relied on persuasive data establishing that the New Jersey intermediate courts' approach to the pollution exclusion is fundamentally flawed because they hold that the "sudden and accidental" exception to the pollution exclusion applies to the *property damage*

caused by a release of contamination, not to the *release* itself, in derogation of the plain language of the exclusion.[4] "Persuasive data" was also presented to the Fourth Circuit that the New Jersey courts' approach was flawed because these courts have equated "sudden and accidental" with "expected or intended" and have entirely failed to give "sudden" its plain and ordinary temporal meaning of "abrupt" or "rapid". The Fourth Circuit did not reach this issue.

Because these decisions are not consistent with established New Jersey law regarding the interpretation of contracts, the Fourth Circuit properly determined that they would not be followed by the New Jersey Supreme Court.

A. *New Jersey Rules of Contract Interpretation*

The fundamental premise of New Jersey contract law is that contracts must be given a reasonable interpretation. *Matter of Community Medical Center*, 623 F.2d 864 (3rd Cir. 1988) (New Jersey law). In New Jersey, the words of an insurance policy are to be given their ordinary and usual meaning, and in the absence of ambiguity, New Jersey courts are not to engage in a "strained construction to support the imposition of liability." *Longobardi* v. *Chubb Ins. Co. of N.J.*, 121 N.J. 530, 582 A.2d 1257 (1990); *Brynildsen* v. *Ambassador Ins. Co.*, 113 N.J. Super. 514, 274 A.2d 327 (1971). As one New Jersey court has stated, courts should not "write for the insured a better policy of insurance than the one purchased." *Walker Rogge, Inc.* v. *Chelsea Title & Guar. Co.*, 116 N.J. 517, 529, 562 A.2d 208, 214 (1989).

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[4] These New Jersey intermediate courts have generally held that the pollution exclusion is merely a "restatement" of the definition of "occurrence" in the policies. The policies define an occurrence as "bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Petition for Writ of Certiorari* at A-7.

Moreover, "effect, if possible, will be given to all parts of the instrument and the construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable." *Prather* v. *American Motorists Ins. Co.*, 2 N.J. 496, 67 A.2d 135, 138 (1949); *New Wrinkle, Inc.* v. *John L. Armitage & Co.*, 238 F.2d 753 (3rd Cir. 1956).

Following these guideposts, the Fourth Circuit properly determined that the New Jersey Supreme Court would conclude that: 1) "sudden and accidental" applies to the *release* of pollution, not any resulting property damage; and 2) deliberate dumping of waste on a regular basis over the course of many years is not "sudden and accidental" within the meaning of the pollution exclusion.

B. *The Fourth Circuit Had Ample Authority For Disregarding "Incorrect" State Court Decisions Regarding the Pollution Exclusion.*

Other federal courts interpreting the pollution exclusion clause have engaged in the same analysis and reached the same result as the Fourth Circuit. In *Borden Inc.* v. *Affiliated FM Ins. Co.*, 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd without op.*, 865 F.2d 1267 (6th Cir. 1989), *cert. den.*, 493 U.S. 817 (1989), the District Court for the Southern District of Ohio was faced with the question of how the Ohio Supreme Court would interpret the term "sudden and accidental" in the pollution exclusion. A state appeals court had found that, where the insured did not intend the damage caused by hazardous waste, the release was "sudden and accidental". *See Buckeye Union Ins. Co.* v. *Liberty Solvents & Chemicals Co., Inc.*, 17 Ohio App.3d 127, 477 N.E.2d 1227 (1984). The *Borden* court, while noting that the *Buckeye* decision was entitled to some deference, rejected this decision because it was persuaded

that the Ohio Supreme Court would not "twist" the meaning of the unambiguous term "sudden and accidental" to provide insurance coverage. *Borden*, 682 F. Supp. at 930. The court added that the insured's deliberate and long term disposal of hazardous substances was "precisely the type of activity which the pollution exclusion was drafted to preclude." *Id.*

In *FL Aerospace* v. *Aetna Cas. & Surety Co.*, 897 F.2d 214 (6th Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S.Ct. 284 (1990), the Court of Appeals for the Sixth Circuit was faced with the question of whether the pollution exclusion clause bars coverage for a long term disposal of hazardous substances. Although Michigan's Supreme Court had not yet ruled on the pollution exclusion, several state appellate court decisions had found that the pollution exclusion clause did not apply if damage was "unexpected" or "unintended" *See, e.g., Jonesville Products, Inc.* v. *Transamerica Ins. Group*, 156 Mich. App. 508, 402 N.W.2d 46 (1986), *app. den.*, 428 Mich. 897 (1987). The court, applying settled Michigan principles of insurance contract interpretation, found that the term "sudden and accidental" was not ambiguous and that the Michigan Supreme Court would give this term its plain, everyday meaning which includes a temporal component. *FL Aerospace*, 897 F.2d at 219-20.

Similarly, in *State of New York* v. *Amro Realty Corp.*, 697 F. Supp. 99 (N.D.N.Y 1988), *aff'd in part, rev'd in part*, 936 F.2d 1240 (2d Cir. 1991), the District Court in New York predicted that the New York Court of Appeals would reject lower court opinions which applied the pollution exclusion only where the insured expected or intended to cause environmental harm. The *Amro* court was right — in *Technicon Elecs. Corp.* v. *American Home Assurance Co.*, 74 N.Y. 2d 66, 544 N.Y.S. 2d 531, 542 N.E.2d 1042 (1989), New York's high court found the pollution exclusion unambiguous and rejected the lower courts' decisions.

C. *The New Jersey Supreme Court Would, at a Minimum, Conclude that "Sudden and Accidental" Applies to the Release of Pollution and Not to Any Resulting Property Damage.*

By its plain terms, the "sudden and accidental" exception to the pollution exclusion applies to the "discharge, dispersal, release, or escape" of pollutants, not any resulting damage. Regardless of what meaning the New Jersey Supreme Court would ascribe to the words "sudden and accidental", it is clear that they apply to the discharge of pollutants and not to the resulting damage. The pollution exclusion is not susceptible of a reasonable reading that the words "sudden and accidental" modify the damage that results from the release of pollutants. Accordingly, the Fourth Circuit properly predicted that the New Jersey Supreme Court would not follow the lower court decisions but would, at a minimum, conclude that the words "sudden and accidental" refer to the *release* of the pollutant itself.

While there has been disagreement in reported cases concerning the meaning of the words "sudden and accidental", cases outside of New Jersey are in general accord that these words apply to the release of pollutants, not the resulting harm. *Lumbermens Mut. Cas. Co.* v. *Belleville Indus., Inc.*, 407 Mass. 675, 679, 555 N.E.2d 568 (1990) ("The sudden event to which the exception in the pollution exclusion applies concerns neither the cause of the release or the damage caused by the release. It is the release itself that must have occurred suddenly, if the exception is to apply so as to provide coverage."); *Technicon Elecs. Corp.* v. *American Home Assurance Co.*, 74 N.Y.2d 66, 542 N.E.2d 1048, 544 N.Y.S.2d 531 (1989) ("[T]he pollution exclusion clause at issue here is directed at the polluting act itself — the discharge, dispersal or escape."); *Transamerica Ins. Co.* v. *Sunnes*, 77 Or. App. 136,

141, 711 P.2d 212 (1985), *rev. den.*, 301 Or. 76, 717 P.2d 631 (1986), ("The exception to the exclusion clause is concerned only with whether the discharge or release of pollutants is accidental or intended and not with whether the resulting damage was also intended".) Numerous other cases have joined in this fundamental holding.[5] Most recently, in *New Castle County* v. *Hartford Accident and Indem. Co.*, 933 F.2d 1162, 1169 (3d Cir. 1991), the Third Circuit wrote:

> By its own terms, the pollution exclusion clause forecloses coverage for damage caused by the discharge of pollutants, unless "such discharge, dispersal, release or escape is sudden and accidental." However, in holding that the County's claim fits within the "sudden and accidental" exception, the district court focused on whether the pollution damage was sudden and accidental. We think that the court, as the plain language of the pollution exclusion suggests, should have inquired whether the discharge of the pollutants from Tybouts Corner was both sudden and accidental. Based on our reading of the record facts, we believe that this shift of focus from damage to discharge may change the outcome of the case.

[5] *See, e.g., Fireman's Fund Ins. Cos.* v. *Ex-Cell-O Corp.*, 702 F. Supp. 1317 (E.D. Mich. 1988) ("The focus of the pollution exclusion is on the discharge or release of pollutants into the environment."); *International Minerals & Chemical Corp.* v. *Liberty Mutual Ins. Co.*, 168 Ill. App. 3d 361, 522 N.E.2d 758, (Ill. Ct. App. 1st Dist. 1988), *appeal denied*, 122 Ill. 2d 576, 530 N.E.2d 246 (Ill. 1988) ("Whereas the general insuring provision focuses only on the damage and the pollution exclusion clause focuses on the event or activity as well as on the nature of the damage, the exception is concerned only with the event or activity — the discharge, dispersal, release or escape of pollutants.").

Although the Third Circuit found that "sudden" meant "unexpected", it unequivocally held that the phrase "sudden and accidental" refers to the release of pollutants and not the resulting damage.

The Fourth Circuit was required to determine, as would the New Jersey Supreme Court, whether the releases of pollution at the Buckeye Landfill were "sudden and accidental". The Fourth Circuit reasonably determined that in order to give effect to the plain meaning of all the words it was necessary for the term "sudden and accidental" to apply to the release of pollutants and not the resulting damage. Petitioner has offered no indication as to why the Fourth Circuit's determination was unreasonable or not in accord with the standards of *Salve Regina* and *Bosch's Estate*.

D. *The Fourth Circuit Properly Determined That the New Jersey Supreme Court Would Hold That the Releases of Triangle's Sludge at the Buckeye Landfill Were Not Sudden and Accidental.*

In order to establish that it was entitled to coverage under the pollution exclusion in the CGL policies at issue, Triangle had to establish that the releases of pollutants at the Buckeye Landfill were *both* sudden *and* accidental.[6] Because the Fourth Circuit properly predicted that the Supreme Court of New Jersey would find that, pursuant to the plain meaning of the

[6] The burden of establishing that the releases were sudden and accidental is on the policyholder. *Cooper Development Co.* v. *Employers Ins. of Wausau*, 765 F. Supp. 1429 (N.D. Cal. 1991); *CPC Int'l Inc.* v. *Northbrook Excess and Surplus Ins. Co., supra; Fischer & Porter Co.* v. *Liberty Mutual Ins. Co.*, 656 F. Supp. 132 (E.D. Pa. 1986); *Fireman's Fund Ins. Co.* v. *Ex-Cell-O Corp., supra; Covenant Ins. Co.* v. *Friday Engineering, Inc.*,, 742 F. Supp. 708 1990 U.S. Dist. LEXIS 10,821 (D. Mass. 1990); *Hudson Ins. Co.* v. *Double D Mgmt. Co.*, 768 F.Supp. 1542 (M.D. Fla. 1991); 19 Couch on Insurance 2d §79.385.

words "sudden" and "accidental", Triangle did not meet this burden, the Fourth Circuit properly ruled in favor of the Insurers.

1. The Releases Of Triangle's Sludge At The Buckeye Landfill Were Not "Accidental".

By its plain meaning an "accident" is a discrete fortuitous event which happens within a short time at a specific time and place. Indeed, even one of the cases relied upon by Triangle in its Petition for a Writ of Certiorari held that "accidental" means "happening unexpectedly or by chance, taking place not according to the usual course." *Lansco, Inc.* v. *Department of Environmental Protection*, 138 N.J. Super. 275, 350 A.2d 520, 88 A.L.R. 3d 172 (Ch. Div. 1975), *aff'd*, 145 N.J. Super 433, 368 A.2d 363 (App. Div. 1976), *certif. den.*, 73 N.J. 57, 372 A.2d 322 (1977).[7] This is consistent with the plain meaning of the word "accident" which generally means a fortuitous and unexpected event, happening by chance alone.[8] In its ordinary usage, "accidental" is contrasted with "intentional"

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[7] New Jersey courts have found that the term "accident" had a limited temporal character. One of the leading cases to consider what constitutes harm "caused by accident" is *U.S. Radium Corp.* v. *Globe Indemnity Co.*, 13 N.J. Misc. 316, 178 A. 271 (1935), *aff'd*, 116 N.J.L. 90, 182 A. 626 (1936). The New Jersey Supreme Court held that the injury resulting from exposure to radium over the course of four years was not "caused by accident."

Other New Jersey cases are in accord with *Globe Indemnity*. *See, e.g., Dudley* v. *Victor Lynn Lines, Inc.*, 32 N.J. 479, 491, 161 A.2d 479, 485-86 (1960). In *Liondale Bleach, Dye & Paint Works* v. *Riker*, 85 N.J.L. 426, 429, 89 A. 929, 931 (1914), the New Jersey Supreme Court held that "where no specific time or occasion can be fixed upon as the time when the alleged accident happened, there is 'no injury by accident.'" The specific time and occasion requirement set forth in *Liondale* is so well-established in New Jersey that it has been characterized as a "time-honored test," *Ptak* v. *General Electric Co.*, 13 N.J. Super. 294, 298, 80 A.2d 337, 339, *aff'd*, 16 N.J. Super. 573, 85 A.2d 214 (1951), and as a "long accepted definition." *Harden* v. *Morris Basin Dry Docks Co.*, 23 N.J. Super. 48, 52, 92 A.2d 148, 150 (1952); *see also Roberts* v. *Beitler*, 34 N.J. Super. 470, 475-76, 112 A.2d 797, 800 (1955).

[8] *Webster's Third New Intermediate Dictionary* (1966).

or "deliberate." This view of "accident" has been endorsed by numerous "pollution exclusion" cases.[9]

Applying the plain meaning of the word "accidental", the Fourth Circuit predicted that the New Jersey Supreme Court would find that the regular dumping of Triangle's sludge directly onto the ground at the Buckeye Landfill over the course of several years was not "accidental". Indeed, the record below established that dumping of this sludge was entirely *deliberate*; it is precisely what Triangle arranged for and what it expected to happen. Fourth Circuit Joint Appendix at 440-451, 452-457. Triangle consigned this waste to a hauler with the knowledge and understanding that it would be dumped at the Buckeye Landfill. Moreover, Triangle arranged for the sludge to be "open dumped" — that is dumped directly on the ground without being placed in any containers. *Id.* at 816.

In light of the fact that approximately 20,000 tons of sludge was open dumped, there was no basis for Triangle to assert that it did not expect or intend that this sludge would be "released" into the environment. The releases of this sludge into the environment were not "without previous notice . . . unforeseen; unexpected . . ." (*Lansco's* definition of "sudden"), nor did they happen "unexpectedly or by chance; taking place not according to the usual course." (*Lansco's* definition of "accidental".) The record clearly demonstrates that the releases of Triangle's sludge into the environment were *expected* and *by design*; they clearly *did* take place "according to the usual course of things." Thus, even under the definitions endorsed by the Lansco court, these releases were not "sudden and accidental". Because the dumping of Triangle's sludge at the Buckeye Landfill was an intentional act which was carried

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[9] *See, e.g., Waste Management of Carolinas, Inc.* v. *Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374 (N.C. 1986); *Fischer & Porter Co.* v. *Liberty Mutual Ins. Co.*, 656 F.Supp. 132 (E.D. Pa. 1986) (a "regular, routine business operation" is not an accident).

on over a long period of time the Fourth Circuit correctly found that it was not "accidental".[10]

2. The Releases Of Triangle's Sludge At The Buckeye Landfill Were Not "Sudden".

Triangle's argument is premised on the New Jersey intermediate Courts' determination that "sudden and accidental" means "expected or intended" and that the pollution exclusion is merely a restatement of the "occurrence" definition. This approach is fundamentally flawed in two ways: 1) it fails to accord "sudden" its plain and ordinary temporal meaning of abrupt or rapid; and 2) in so doing, it effectively reads the word "sudden" out of the policies.

Both of these flaws are in direct contravention of established New Jersey contract interpretation law. Accordingly, the New Jersey Supreme Court would decline to follow these decisions and would, rather, conclude that "sudden" includes a temporal meaning and the pollution exclusion is not a mere restatement of the "occurrence" definition.

Both the plain meaning of the word "sudden", and its use in conjunction with the word "accidental", compel a conclusion that it must be given a temporal meaning. Numerous courts have had the opportunity to construe the word "sudden" in the context of the pollution exclusion. Most of them have identified the same elements in determining whether a release of pollutants is "sudden." These courts have concluded:

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[10] *See Great Lakes Container Corp.* v. *National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984) (no coverage where contamination was result of insured's ordinary operations); *American States Ins. Co.* v. *Maryland Casualty Co.*, 587 F. Supp. 1549, 1553 (E.D. Mich. 1984) (exclusion intended to eliminate coverage for "the emissions of pollutants as a regular or continuous part of the insured's business"); *Barmet of Indiana, Inc.* v. *Security Ins. Group*, 425 N.E.2d 201 (Ind. App. 1981) (emissions insured knew would continue as part of its business operations not sudden and accidental); *U.S. Fidelity & Guaranty Co.* v. *Star Fire Coals Inc.*, 856 F.2d 31 (6th Cir. 1988) (same).

> The definition of "sudden" is not a subjective definition, but an objective one. Even if "sudden" is not limited to an instantaneous happening, it must still be on brief notice, and must be unexpected. No use of the word "sudden" or "suddenly" could be consistent with an event which happened gradually or over an extended period of time, nor could it be consistent with an event which was anticipated or predictable.

American Motorists Ins. Co. v. *General Host. Corp.*, 667 F. Supp. 1423, 1428 (D. Kan. 1987), *aff'd*, 946 F.2d 1482 (10th Cir. 1991). Other courts echo this view:

> "Sudden" is understood in its ordinary, most common and most popular sense, to have a temporal significance. Webster's dictionary defines "sudden" as "happening without previous notice or with very brief notice"; "abrupt": "characterized by and manifesting hastiness"; *Webster's Third New International Dictionary*, (1976) and we decline to ignore these temporal focused definitions. . . .

International Minerals & Chem. Corp. v. *Liberty Mut. Ins. Co.*, 168 Ill. App. 3d 361, 522 N.E.2d 758 (App. Ct. 1988). *See also Fireman's Fund Ins. Cos.* v. *Ex-Cell-O Corp.*, 702 F. Supp. 1317 (E.D. Mich. 1988) ("sudden" in the pollution exclusion includes the temporal component of abruptness and means "brief, momentary, or lasting only a short time"); *C.L. Hauthaway & Sons Corp.* v. *American Motorists Ins. Co.*, 712 F. Supp. 265 (D. Mass. 1989) ("the term 'sudden' within the context of a pollution exclusion encompasses quite clearly a temporal aspect of immediacy, abruptness, swiftness, quickness, instantaneous and brevity.") *Lumbermens Mut. Cas. Co.*

Mut. Cas. Co. v. *Belleville Indus., Inc.*, 407 Mass. 675, 555 N.E.2d 568 (1990) ("The issue is whether the release was sudden. The alternative is that it was gradual. . . . [o]nly an abrupt discharge or release of pollutants falls within the exception"). Numerous decisions support the proposition that ongoing, regular or continuous discharges of pollutants into the environment cannot, in any way, be classified as "sudden."

3. The Pollution Exclusion Does Not Restate The "Occurrence" Definition

Triangle argues that the pollution exclusion is simply a restatement of the definition of "occurrence." The few cases that have reached this result have correctly been subject to extreme criticism.[11] There is simply no basis in New Jersey law, or in logic, for equating the words "sudden and accidental" with the words "expected or intended".

The gravaman of Triangle's argument (and of the cases upon which it relies) is that the word "sudden" is ambiguous because it has dictionary definitions which encompass both a temporal concept of abruptness and the sense of unexpectedness. Merely having two dictionary meanings, however, does not render a word ambiguous. *See, e.g., Upjohn* v. *New Hampshire Ins. Co.*, 197, 207, 476 N.W.2d 392, 397 (Mich. Sup. Ct. 1991), at 208-209, fn. 8 (noting that if the mere existence of multiple dictionary definitions rendered a word ambiguous, "it would be virtually impossible to write a contract that was unambiguous"). "Sudden", like most words in the English language, may have different meanings depending on the context in which it is

[11] *United States Fidelity & Guar. Co.* v. *Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988) ("specifically, we believe that District Court erred when it treated the pollution exclusion and the "occurrence" definition to be interchangeable"); *United States Fidelity & Guar. Co.* v. *Murray Ohio Mfg. Co.*, 693 F. Supp. 617 (M.D. Tenn 1988), *aff'd.*, 875 F.2d 868 (6th Cir. 1989) ("The [pollution] exclusion clause is not a mere restatement of the definition of occurrence"); *Morton Thiokol, Inc.* v. *General Accident Ins. Co. of America*, No. C-3956-85 (NJ. Super. Ct., Law Div., Bergen Co., August 27, 1987).

used. *But context is everything*. For example, in the abstract, "bolt" can mean either a lock or hasty flight, "pen" a writing implement or enclosure for animals and "shot" a discharge of a weapon or a drink of whiskey. In context, however, the meaning of each is clear and there is no ambiguity.

The same is true of "sudden". Appearing in the conjunctive with "accidental", which *itself* means "unexpected", it is clear that the temporal meaning of sudden (hasty, abrupt) must control in order to avoid a redundancy which negates part of the contract. The exclusion refers to releases which are "sudden and accidental." Clearly, to give meaning to this phrase, "sudden" must mean something *beyond* "accidental" or "unexpected". The context is the key. See *Lumbermens Mut. Cas. Co.* v. *Belleville Indus. Inc., supra* at 680, 681, ("for the word 'sudden' to have any significant purpose, and not to be surplusage when used generally in conjunction with the word 'accidental', it must have a temporal aspect to its meaning, and not just the sense of something unexpected."); *Northern Ins. Co.* v. *Aardvarks Assoc., Inc.*, 942 F.2d 189 (3rd Cir. 1991) ("To read 'sudden and accidental' to mean only unexpected and unintended is to rewrite the policy by one important pollution coverage requirement — abruptness of the pollution discharge. The very use of the words 'and accidental' reveals a clear intent to define the words differently, stating two separate requirements.") (emphasis in original).

New Jersey law requires that *every word* in the policies be given effect; the policy may not be read so as to render any word or term surplusage. *Prather, supra*. Interpreting "sudden" as "unexpected" renders it synonymous with "accidental" and reads the word "accidental" out of the policy. If Triangle's interpretation is followed, the pollution exclusion will not apply

to releases which are "accidental and accidental". The absurdity of this result is self evident.[12]

[12] Interpreting "sudden" as "unintended and unexpected" renders it synonymous with "accidental", as that term is employed in the policy and thus, the word "accidental" can be read out of the exception as nothing more than redundant surplusage. Such a reading does not comport with fundamental rules of contract construction requiring that to the extent possible, all words used in a contract be given effect.

International Minerals and Chem. Co. v. Liberty Mutual Ins. Co., *supra*, at 769.

Conclusion.

For the reasons specified above, this Court should refuse to issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in this matter and should refuse to stay the proceedings of the Fourth Circuit.

Respectfully submitted,

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